

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

HOTEL BEL-AIR

and

Case 31-CA-074675

UNITE HERE, LOCAL 11

ORDER

The Employer's petition to revoke subpoena duces tecum B-638786 is denied. The subpoena seeks information relevant to the matter under investigation and describes with sufficient particularity the evidence sought, as required by Section 11(1) of the Act and Section 102.31(b) of the Board's Rules and Regulations. Further, the Employer has failed to establish any other legal basis for revoking the subpoena.¹ See generally *NLRB v. North Bay Plumbing, Inc.*, 102 F.3d 1005 (9th Cir. 1996); *NLRB v. Carolina Food Processors, Inc.*, 81 F.3d 507 (4th Cir. 1996).

Dated, Washington, D.C., August 6, 2012.

MARK GASTON PEARCE,	CHAIRMAN
BRIAN E. HAYES,	MEMBER
RICHARD F. GRIFFIN, JR.,	MEMBER

¹ In considering the petition to revoke, we have evaluated the subpoena in light of the Region's statement that it is willing to clarify the scope of the subpoena so that the term "applicant" is defined as "any individual applying for a position or positions at the Employer, which positions perform, in whole or substantially, work that was previously performed by employees in the bargaining unit as described in Section 3.A. of the August 16 to September 30, 2009 collective-bargaining agreement." (Region's Opposition, pp. 7-8.) It appears that the Region's reference to "August" 16 is a typographical error, and we have interpreted this as a reference to the parties' collective-bargaining agreement effective from April 16, 2006 to September 30, 2009.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31**

HOTEL BEL-AIR

and

Cases 31-CA-74675

UNITE HERE, Local 11

PETITION TO REVOKE SUBPOENA DUCES TECUM B-638786

Pursuant to the National Labor Relations Board's Rules and Regulations, Hotel Bel-Air hereby petitions to revoke *subpoena duces tecum* number **B-638786** (the Subpoena) issued by the Region in the above-referenced case for the reasons stated herein [the Subpoena is attached to this Petition]. This petition to revoke the subpoena is timely because it is filed with the NLRB less than five (5) days after the subpoena was received by Hotel Bel-Air on June 13, 2012, in accordance with the Casehandling Manual § 11782, and Board Rules and Regulations § 102.31(b).

First, our firm has asked for copies of the statements and documents that support the false accusations contained in 31-CA-74675. Such information is essential for Hotel Bel-Air to accurately respond to the charges against it, and to confront the witnesses whose allegations form the basis of the Charge. On every occasion, the Board has refused these disclosure requests. Now, when asked to respond to a wide-ranging *subpoena duces tecum*, Hotel Bel-Air is kept in the dark, left to guess at the nature of the specific accusations to which these documents are meant to respond. The basis of Hotel Bel-Air's Petition to Revoke must be that the subpoena does not relate to any matter under investigation, that the subpoena does not describe the

evidence sought with sufficient particularity, or if for any other reason sufficient in law the subpoena is otherwise invalid. However, Hotel Bel-Air has not been provided with the details of the Charging party's accusations such that Hotel Bel-Air can formulate an adequate defense.

With this in mind, and based upon the information available, this Subpoena should be revoked for the following reasons:

1. The NLRB lacks jurisdiction over this matter.
2. The subpoena duces tecum requests material that is beyond the scope of the Board's investigation.

The Regional Director has discretion to issue investigative subpoenas during ULP investigations so long as those subpoenas seek evidence that will "materially aid" the determination for an administrative decision on the merits of a ULP charge. ULP Casehandling Manual § 11770.2. To this end, Board policy admonishes Agents for using the word "all" such document requests, as is found in this instance. *Id.* Instead, the ULP Casehandling Manual § 11776, suggests a refined response to a document request that involves a sworn affidavit or an admissible summary of such evidence so long as the "pertinent records are made available to the Board agent to ensure accuracy."

Hotel Bel-Air here petitions to revoke this request on the grounds that the vast majority of information contained in the request documents is beyond the scope of this investigation and irrelevant.

- a. The Region has subpoenaed two years of performance evaluations for hundreds of employees without determining whether such records were at all related to the alleged 8(a)3 discrimination.

- b. The Region has provided no date-specific limitations to its subpoena request, and instead crafts its request in a way that includes individual records over a broad time range, in many different scenarios.
- c. The Region has provided no limitations on the category of employee whose record must be produced. For example, the Region's subpoena request includes records of supervisory employees, hourly workers, administrative staff, and security personnel – job categories excluded from most bargaining units.

The Subpoena thus requests material that is far outside the scope of any reasonable investigation into the alleged charge, and instead demands that Hotel Bel-Air allow Board agents to embark on an unjustified fishing expedition.

The subpoena must be revoked, or, at the very least, narrowed so that it includes only that material that is within a reasonable scope of its investigation.

DATED: June 18, 2012

STOKES, ROBERTS & WAGNER



Peter G. Fischer

3593 Hemphill Street
Atlanta, GA 30337
(404) 766-0076
(404) 766-8823 (FAX)

ATTORNEY FOR HOTEL BEL-AIR

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31**

HOTEL BEL-AIR

and

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UNITE HERE, Local 11

PROOF OF SERVICE

I am employed in the County of Fulton, State of Georgia. I am over the age of eighteen years and not a party to the within action; my business address is 3593 Hemphill Street, Atlanta, Georgia 30337.

On June 18, 2012, I caused the following document(s) to be served: **PETITION TO REVOKE SUBPOENA** on the interested party below in this action by filing the enclosed

- ☐ BY MAIL: I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Atlanta, Georgia, in the ordinary course of business pursuant to Code of Civil Procedure Section 1013(a). I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
- ☐ BY FACSIMILE: I served said document(s) to be transmitted by facsimile pursuant to Board's Rules and Regulations, Series 8, as amended, Section 102.24. The telephone number of the sending facsimile machine was (404) 766-8823. The name(s) and facsimile machine telephone number(s) of the person(s) served are set forth in the service list. The sending facsimile machine issued a transmission report confirming that the transmission was complete and without error.
- ☒ BY THE NLRB'S ELECTRONIC FILING SYSTEM on its website:
<http://www.nlrb.gov>.
- ☒ BY ELECTRONIC MAIL to: john.rubin@nlrb.gov

- ☐ BY EXPRESS MAIL: I caused said document(s) to be deposited in a box or other facility regularly maintained by the express service carrier providing overnight delivery pursuant to Code of Civil Procedure Section 1013(c).

Executed on June 18, 2012, at Atlanta, Georgia.

I declare under penalty of perjury under the laws of the State of Georgia that the foregoing is true and correct.



Peter Fischer, Attorney

Attorney for Hotel Bel-Air:

Stokes Roberts & Wagner
3593 Hemphill Street
Atlanta, GA 30337
404.766.0076 Telephone
404.766.8823 Facsimile

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

To Custodian of Records, Hotel Bel-Air

701 Stone Canyon Road, Los Angeles, CA 90077

As requested by John Rubin, agent for the Regional Director

whose address is 11150 W. Olympic Blvd., Suite 700 Los Angeles CA 90064
(Street) (City) (State) (ZIP)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE an agent of the
Regional Director

of the National Labor Relations Board
at National Labor Relations Board, Region 31, 11150 West Olympic Boulevard, Suite 700

in the City of Los Angeles, CA 90064-1825

on the 20th day of June 20 12 at 1:00 (a.m.) (p.m.) or any adjourned

or rescheduled date to testify in Case No.: 31-CA-074675

Hotel Bel-Air

(Case Name and Number)

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:

See Attachment

In accordance with the Board's Rules and Regulations, 29 C.F.R. Section 102.31(b) (unfair labor practice proceedings) and/or 29 C.F.R. Section 102.66(c) (representation proceedings), objections to the subpoena must be made by a petition to revoke and must be filed as set forth therein. Petitions to revoke must be received within five days of your having received the subpoena. 29 C.F.R. Section 102.111(b) (3). Failure to follow these regulations may result in the loss of any ability to raise such objections in court.

Under the seal of the National Labor Relations Board, and by direction of the Board, this Subpoena is

B - 638786

Issued at Los Angeles, California

this 12th day of June 20 12



7001 0320 0004 3031 9313

Lesfer A. Neltzer

NOTICE TO WITNESS. Witness fees for attendance, subsistence, and mileage under this subpoena are payable by the party at whose request the witness is subpoenaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpoena with the voucher when claiming reimbursement.

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is mandatory in that failure to supply the information may cause the NLRB to seek enforcement of the subpoena in federal court.

RETURN OF SERVICE

I certify that, being a person over 18 years of age, I duly served a copy of this subpoena

- ☐ by person
- ☐ by certified mail
- ☐ by registered mail
- ☐ by telegraph
- ☐ by leaving copy at principal office or place of business at:

(Check method used.)

on the named person on _____

/ /

(Month, day, and year)

(Name of person making service)

(Official title, if any)

CERTIFICATION OF ATTENDANCE

I certify that named person was in attendance as a witness at _____

on _____ direc _____
(Month, day or days, and year)

(Name of person certifying)

(Official title)

DOCUMENTS TO BE PRODUCED

[Hotel Bel-Air 31-CA-74675]

1. For each applicant for employment in connection with the Employer's 2011 re-opening who was a former employee of the Employer:
 - a. Performance evaluations for their last two years of employment;
 - b. Job application;
 - c. Documents reflecting the Employer's assessment and evaluation of the applicant, including, but not limited to all interviewer notes and evaluations;
 - d. To the extent not covered by paragraph 1c., documents reflecting the Employer's decision to hire or not to hire the applicant.
2. For each applicant whom the Employer hired in connection with the Employer's 2011 re-opening:
 - a. Job application;
 - b. Documents reflecting the Employer's assessment and evaluation of the applicant, including, but not limited to all interviewer notes and evaluations;
 - c. To the extent not covered by paragraph 2b., documents reflecting the Employer's decision to hire the applicant.
3. Documents reflecting the date of the Employer's decision to hire or not to hire each applicant in connection with the Employer's 2011 re-opening, including documents notifying the applicant of the decision.

Hotel Bel-Air
31-CA-74675

SUBPOENA ATTACHMENT
DEFINITIONS AND INSTRUCTIONS:

1. The term "document" shall consist of any written, recorded or graphic matter, or matter existing on computer software or hardware, whether previously erased or not, including, but not limited to correspondence, communications, letters, notebooks, notes, handwritten notes, personal notes, facsimiles, memoranda, statements, telephone contacts, telegrams, tapes, tape recordings, videotapes, photographs, records, lists, certificates, files, books, pamphlets, periodicals, contracts, agreements, bookkeeping entries, receipts, work orders, financial statements, tax returns, checks, check stubs, proposals, leases, addenda, reports, summaries, compilations, charts, graphs, applications, summaries or records of telephone conversations, summaries or records of personal conversations, diaries, logs, appointment calendars, computer discs or other computer format, minutes or records of meetings and conferences, records, reports or summaries of negotiations, drafts of documents, copies, marginal notations, and all other written, printed, recorded, or graphic matter or sound reproductions, and electronic mail and voice mail messages, however produced or reproduced.
2. (a) The terms "copy" or "copies" shall refer to exact and complete copies of original documents and shall be accepted in lieu of originals, except where otherwise provided, and provided that such copies are exact and complete copies of original documents and that the original documents shall be made available upon request prior to the hearing or at the time of production, for the purpose of verifying the accuracy of such copy or copies.
(b) Any copies of original documents that are different in any way from the original, whether by interlineation, receipt, stamp, notations, indications of copies sent or received, or otherwise, shall themselves be considered original documents and must be produced separately from the originals or copies of originals satisfying the requirements of paragraph 2(a).
3. The terms "Employer" and "Respondent" and "facility" refer to the Hotel Bel-Air facility located in and around 701 Stone Canyon Road, Los Angeles, CA 90077.
4. The term "you" or "your" refers to the Custodian(s) of Records for the Employer.
5. Documents subpoenaed shall include all documents in your physical possession, custody or control, your present or former supervisors, agents, attorneys, accountants, advisors, investigators, and any other persons and entities directly or indirectly employed by, or connected with you.
6. The terms "relating to" or "related to" shall mean, in whole or in part, constituting, containing, setting forth, showing, reflecting, mentioning, concerning, disclosing, describing, explaining, summarizing, analyzing, dealing with, concerning or referring to.
7. The terms "and" and "or" and any other conjunctions or disjunctions used herein shall be read both conjunctively and disjunctively, as is necessary to make each request inclusive, rather than exclusive of any document otherwise within the

- scope of the request and to require the enumeration of all information responsive to all or any part of each request in which any conjunction or disjunction appears.
8. The terms “any,” “each” and “all” shall be read to be all inclusive and to require the production of each and every document responsive to the request in which the term(s) appear.
 9. The singular shall be deemed to include the plural and vice versa.
 10. Any custodian of records of any entity subpoenaed shall be one or more designated agents with knowledge concerning the documents to be produced.
 11. If any document responsive to any request herein was, but no longer is, in your possession, custody or control, (and/or was destroyed, discarded, or otherwise disposed of for whatever reasons) identify the document (stating its date, author, subject, recipients and intended recipients); explain the circumstances by which the document ceased to be in your possession, custody or control, and identify (stating the person’s name, employer title, business address and telephone number, and home address and telephone number) all persons known or believed to have the document or a copy thereof in their possession, custody or control.
 12. The request for documents does not seek documents covered by attorney-client, work-product, or other privileges.
 13. If any document responsive to any request herein was withheld from production on the asserted ground that it is privileged, identify and describe:
 - a. the author;
 - b. the recipient;
 - c. the date of the original document; and
 - d. the subject matter of the document.
 14. This request is continuing in character and if additional responsive documents come to your attention following the date of production, such documents must be promptly produced.
 15. This request contemplates production of responsive documents in their entirety, without abbreviation or expurgation.
 16. All documents produced pursuant to this subpoena should be organized by what subpoena paragraph each document or set of documents are responsive to, and labels referring to that subpoena paragraph should be affixed to each document or set of documents.